L. O. POWER ET AL.

IBLA 75-203, 204, 205, 206 Decided September 5, 1975

Appeal from notices of the Yuma District Office, Bureau of Land Management, terminating agricultural permits.

Affirmed.

1. Rules of Practice: Appeals: Generally

   Decisions rendered by officers of the Bureau of Land Management should contain relevant appeal information except in those situations in which it is clear that no appeal lies.

2. Contracts: Construction and Operation: General Rules of Construction

   Government permits are subject to the same rules of construction as those applied in interpreting a contract between private parties, although contracts and permits have different legal import.

3. Contracts: Construction and Operation: General Rules of Construction

   Where the Government has the absolute right under the terms of a permit to cancel such permit, notice to cancel the permits, properly given, cannot be considered arbitrary or capricious if made in the regular course of conducting government business in the public interest.

APPEARANCES: Elmer C. Coker, Esq., Phoenix, Arizona, for appellants; Edmund J. Clohessy, Esq., Office of the Field Solicitor, United States Department of the Interior, for appellee, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

L. O. Power, Ellis J. Dover, Lois Dover, Noble Rebelin, Sebe Musgrove and Naomi Stevens have appealed from notices of termination, all dated October 1, 1974, of agricultural permits for various lands in the vicinity of Yuma, Arizona. 1/

The permits herein were originally issued in 1961 to regularize what the Government perceived as trespass occupancy on the part of the appellants. The 1961 permits were eventually superseded by 1968 agreements which were the subject of the termination notices. 2/ The agreements entered into in 1968 provided, in relevant part:

> 5. This application is made for an initial term commencing on January 1, 1969, and ending on December 31, 1969, and continuing thereafter for successive periods of one year each; provided, however, that the permit herein applied for may be terminated on December 31st of any year during its term or any extension thereof by written notice served by the applicant upon the United States at least sixty (60) days in advance thereof, and provided further that said permit may be terminated at the end of the initial term or at the end of any such successive one-year period by written notice served by the United States upon the applicant at least ninety (90) days in advance thereof.

This agreement continued in effect until October 1, 1974, when appellants were given written notice of the Government's intent to terminate the permits 3/ as of December 31, 1974.

1/ The respective permits involved herein are: L. O. Power 2 C 31 (A); Ellis J. and Lois Dover 2 A 30 (A); Noble Rebelin 2 A 25 (A); and Sebe Musgrove and Naomi Stevens 2 C 4 (A).

2/ L. O. Power never entered into a 1968 agreement. Subsequent to the issuance of the original permit in 1961, embracing 67 acres, more or less, it was determined that only one acre of land was under federal ownership. Attempts to obtain Power's signature on an amended permit did not meet with success. The only substantive difference between the 1961 form and the 1969 form, was that both parties were required to give a 90-day notice of termination.

3/ A review of the case files does show that each permittee was notified timely of the Government's intention to terminate the lease.

[1] The letter of termination sent out by the Yuma Office notifying the permittees of the prospective termination of their permit did not inform them of any appeal rights that they might have. The BLM Manual provides:

> Parties to BLM decisions either have or do not have the right of appeal by regulation. (See 43 CFR 4.410). Therefore, a decision may neither grant the right where it does not exist nor withhold it where it does exist. State in decisions the right of appeal where it is obvious or apparent. In multiple-party decisions identify in the statement which parties have the right of appeal and any adverse parties to be served. Decisions approved by the Secretary are not subject to appeal.

BLM Manual 1841.15

The Yuma Office evidently did not consider it either "obvious or apparent" that a right of appeal existed from its decision. But the applicable regulation, 43 CFR 4.410, provides that, with certain exceptions not germane herein, "any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right to appeal to the Board." It is clear to us that appellants were adversely affected by the decision to terminate the permits. Despite the fact that they received no notification of their right of appeal, each timely filed a notice of appeal.

Inasmuch as this Board has often held that failure to timely file a notice of appeal is jurisdictional and cannot be waived, see, e.g., United States v. Camerlo, 17 IBLA 303 (1974); Elbert F. Howey, 15 IBLA 208 (1974), Departmental officials should take care lest their actions fatally prejudice the appeal rights of an aggrieved party. We feel that except in those situations in which an adversely affected party clearly has no right of appeal, deciding officers of the Department should, as of matter of course, include appeal information. As the BLM Manual notes "[t]he Board is the sole judge of matters it will entertain or summarily dismiss." BLM Manual 1841.15A.

[2] In order to understand the basic thrust of appellants' argument reference must be made to a lease, dated January 17, 1969, entered into by the United States through the Manager Lower Colorado River Office and the Quechan Tribe of the Fort Yuma Indian Reservation. The lease was issued for a term of 50 years and embraced, inter alia, the federal lands leased by the appellants. The lease contained an express exception of "all rights of third

parties which have lawfully attached to the leased premises prior to the date of this lease," naming all the permits which are the subject of this appeal. Article 8(a) then states "It is understood that to the extent that at such time as a need is demonstrated for the development of facilities provided for in Article 14 of this lease on the lands covered by the above-mentioned permits, such permits may be terminated in whole or in part by the United States at the end of any calendar year by the service of ninety (90) days' advance written notice in accordance with their terms."

Appellants note that Article 14 required that "prior to commencing construction of any improvements on the leased premises and within eighteen months of the date [of the lease] * * * the Lessee shall submit to the Administrator, for his approval, a general development plan for the leased premises."

Appellants' argument proceeds as follows: They are unaware of any approved plan of development and therefore cancellation of their agricultural permits on the basis of a request from the Quechan Tribe where the terms of the Tribe's lease were unfulfilled can only be seen as an arbitrary and capricious action.

There is a fundamental flaw in appellants' argument. Appellee admits that while a development plan was submitted such plan was never approved for various reasons. But appellee correctly points out that under the terms of the appellants' permits both parties had an absolute right to terminate for any reason provided adequate notice as set forth in Article 5 was provided. Appellants are not parties to the lease between the Government and the Quechan Tribe, and they certainly could not be considered third party beneficiaries such as would allow them to seek enforcement thereof. Clearly, the contract between the United States and the Quechan Tribe was not entered into primarily for appellants' benefit.

While recognizing their differing legal import, this Board has often held that permits, leases and contracts entered into between the United States and a private party are subject to the same rules of interpretation that govern between private contracting parties. See, e.g., St. Joe's Mineral Corp., 20 IBLA 272 (1975); Marathon Oil Co., 16 IBLA 298 (1974); Superior Oil Co., 12 IBLA 212 (1973); Amoco Production Co., 10 IBLA 215 (1973).

[3] Appellee exercised its absolute right to cancel the permit in accordance with the permit terms. The lease to the Quechan Tribe described the manner in which termination of the permits could be accomplished upon the filing by the Tribe of an acceptable plan of development for the leased land. As we read the lease to

the Quechan Tribe, it obligated the United States to seek cancellation of the individual permits once approval of a plan for development was given. The absence of an approved plan of development merely made cancellation of the permits discretionary. BLM, according to the brief filed on its behalf, has determined that it is in the public interest to lease these tracts to the Quechan Tribe to permit the Tribe to plan for the agricultural development of the land and to remove conflicts in the event these lands are restored to the Fort Yuma Reservation, inhabited by the Quechan Tribe. In the circumstances, we find the decision below to cancel the permits was a proper exercise of that residual discretionary power. 4/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Edward W. Stuebing
Administrative Judge

4/ Appellants also contend that the land in question is actually owned by the State. This contention, however, is self-defeating. If the State owns the land, an issue which we expressly do not pass upon, the permit would have been void, rather than cancelable. Thus, we cannot see how this argument avails appellants' request for a renewal of their permit.